IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 9TH AUGUST 2007 / 18TH SRAVANA 1929

RSA.No. 150 of 2007()

AS.87/2002 of SUB COURT, KASARAGOD
OS.290/1986 of ADDL.MUNSIFF, KASARAGOD

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: APPELLANTS:/APPELLANTS/DEFENDANTS 8,26 TO 29, 31 AND 32

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1. SHANKAPPA SHETTY M., AGED 89 YEARS,
S/O.UNHAKKE, HINDU, LANDHOLDER,
RESIDING NOW AT NEW STAR MANZION, 4TH FLOOR,
ROOM NO.41, DHOBIWADA ROAD,
JACOB CIRCLE, BOMBAY.

2. YAMUNA SHETTY, AGED 70 YEARS,
W/O. DHOOMANNA SHETTY, KOLKE HOUSE,
KUNJATHUR VILLAGE, KASARGOD DISTRICT.

3. DAYANANDA SHETTY, AGED 52 YEARS,
S/O.DHOOMANNA SHETTY, KILKE HOUSE,
KUNJATHUR VILLAGE, KASARGODE DISTRICT.

4. SHANTHA SHETTY, AGED 43 YEARS,
S/O.DHOOMANNA SHSETTY, KOLKE HOUSE,
KUNJATHUR VILLAGE, KASARGOD DISTRICT.

5. CHANCHALAKSHI SHETTY,
AGED 40 YEARS, D/O.DHOOMANNA SHETTY,
KOLKE HOUSE, KUNJATHUR VILLAGE,
KASARGODE DISTRICT.

6. DIVAKARA SHETTY, AGED 34 YEARS,
S/O.DHOOMANNA SHETTY, KOLKE HOUSE,
KUNJATHUR VILLAGE, KASARGODE DISTRICT.

7. SAVITHA SHETTY, AGED 29 YEARS,
D/O.DHOOMANNA SHETTY, KOLKE HOUSE,
KUNJATHUR VILLAGE, KASARGODE DISTRICT.

BY ADV. SRI.O.V.MANIPRASAD

RESPONDENTS: /RESPONDENTS/PLAINTIFFS AND DEFENDANTS 1 TO 7, 9 TO 25, 30,33 TO 40

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1. KUNHARE HENGSU, AGED 80 YEARS (DIED).

2. BHAGI HENGSU, AGED 78 YEARS,
   W/O.THIMMAYYA KAVE, RESIDING AT KOLAKKE HOUSE,
   KUNJATHUR VILLAGE, P.O.KUNJATHUR,
   KASARAGODE TALUK.

3. DEVAKI ALIAS KORAPALU AGED 74 YEARS
   (DEID).

4. GOPI, AGED 53 YEARS,
   W/O.VENKAPPA SHETTY, RESIDING AT
   KOLAKKE HOUSE, KUNJATHUR VILLAGE, P.O.KUNJATHUR,
   KASARGOD TALUK.

5. PUSHPA, AGED 51 YEARS,
   W/O.PADMANABHA POONJAY, RESIDING AT KOLAKKE
   HOUSE, KUNJATHUR VILLAGE, P.O.KUNJATHUR,
   KASARAGOD TALUK.

6. VIMALA, AGED 50 YEARS, S/O.SRINIVASA,
   RESIDING AT KOLAKKE HOUSE, KUNJATHUR VILLAGE,
   P.O.KUNJATHUR, KASARGODE TALUK.

7. RATHNA, AGED 45 YEARS,
   W/O.POOVAPPA, RESIDING AT KOLAKKE HOUSE,
   KUNJATHUR VILLAGE, P.O.KUNJATHUR,
   KASARGOD TALUK.

8. DEVAKI, AGED 44 YEARS,
   W/O.LINGAPPA SHETTY, RESIDING AT KOLAKKE HOUSE,
   KUNJATHUR VILLAGE, P.O.KUNJATHUR,
   KASARAGOD TALUK.

9. KRISHNA SHETTY, AGED 49 YEARS,
   S/O.KUNHAMMA SHETTY, RESIDING AT KOLAKKE HOUSE,
   KUNJATHUR VILLAGE, P.O.KUNJATHUR,
   KASARGODE TALUK.

10. JAGANNATHA, AGED 39 YEARS,
    S/O.SANJEEVA SHETTY, RESIDING AT KOLAKKE HOUSE,
    KUNJATHUR VILLAGE, P.O.KUNJATHUR,
    KASARGOD TALUK.

11. SOWJANYA, AGED 38 YEARS,
    D/O.PADMANABHA POONJA, RESIDING AT
    KOLAKKE HOUSE, KUNJATHUR VILLAGE,
    P.O.KUNJATHUR, KASARGOD TALUK.

12. UDAYA, AGED 35 YEARS,

S/O.VENKAPPA SHETTY, RESIDING AT KOLAKKE HOUSE,
KUNJATHUR VILLAGE, P.O.KUNJATHUR,
KASARGODE TALUK.

13. VIJAYAKUMAR, AGED 28 YEARS,
S/O.VENKAPPA SHETTY, RESIDING AT KALAKKE HOUSE,
KUNJATHUR VILLAGE, P.O.KUNJATHUR,
KASARGODE TALUK.

14. MANJAKKE, AGED 59 YEARS,
W/O.VENKAPPA SHETTY, RESIDING AT GOLIDADI HOUSE,
UDYAVARA VILLAGE, P.O.KUNJATHUR,
KASARGOD TALUK.

15. RAMEKKE ALIAS PUSHPA,
AGED 56 YEARS, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARGODE TALUK.

16. SASHIKALA, AGED 40 YEARS,
D/O.VENKAPPA SHETTY, RESIDING AT
GOLIDADI HOUSE, UDAYAVARA VILLAGE,
P.O.KUNJATHUR, KASARGOD TALUK.

17. PREMA, AGED ABOUT 38 YEARS,
D/O.MONAPPA CHOWTA, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARAGOD TALUK.

18. SHEKARA, AGED 34 YEARS,
S/O.VENKAPPA SHETTY, RESIDING AT
GOLIDADI HOUSE, UDAYAVARA VILLAGE,
P.O.KUNJATHUR, KASARGOD TALUK.

19. BALAKRISHNA, AGED 31 YEARS,
S/O.MONAPPA CHOWTA, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARGOD TALUK.

20. MUNDAPPA N. RAI, AGED 62 YEARS,
S/O.UNHAKKE, ROOM NO.26, BLOCK NO.106,
PREMANAGAR, SREE RAM, POWERING JANATHY COLONYH,
JOGESHWAR (E) BOMBAY-400 050.

21. SUNDARI S. ALUVA, AGED 55 YEARS,
W/O.SHANKARA ALUA, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARAGOD TALUK.

22. VITTALA ALVA, AGED 49 YEARS,
S/O.SHANKARA ALVA, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARGOD TALUK.

23. MADHUSOODANA, AGED 34 YEARS,
S/O.SHANKARA ALVA, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARGOD TALUK.

24. RAGUNATHA, AGED 31 YEARS,
S/O.SHANKARA ALVA, KOLAKKE HOUSE,
KUNJATHUR VILLAGE, KUNJATHUR P.O.,
KASARGOD TALUK.

25. K. KARAGAPPA SHETTY, AGED 80 YEARS,
S/O.THYAMPANNA SHETTY, ROOM NO.11,
BUILDING NO.5 (1960) 1ST FLOOR,
M.L.CAMP, BO;MBAY-400 019.

26. NANDAPPA.L K. SHETTY, AGED 60 YEARS,
S/O.KUNHANNA SHETTY, 76 BHAVANI BUILDING,
ANUSHAKTE NAGAR, BOMBAY-400 094.

27. THYAMPANNA K. SHETTY,
AGED 59 YEARS, S/O.KUNHANNA SHETTY,
ROOM NO.3, JANAK M. JOSHI CHAWL,
OLD DOMBIVALI ROAD, NEAR SHIV TEMPLE
DOMBIVALI WEST, THANE DISTRICT, MAHARASHTRA.

28. DOOMANNA K. SHETTY, AGED 57 YEARS,
S/O.KUNHANNA SHSETTY, MSTC, CANTEEN 33 A,
LOTUS HOUSE, 1ST FLOOR, NEW MARINE LINE,
MOMBAY.

29. SHEKARA T. SHETTY, AGED 48 YEARS,
S/O.THIMMAYYAKAVEL, 812, RAHAJA CHAMBER,
NARIMAN POINT, BOMBAY-21.

30. REVATHI SHETTY, AGED 61 YEARS,
WIDOW OF RAMANNA SHETTY,
SUKHO SAGAR COLONY KOLYAN, THANE DISTRICT,
MAHARASHTRA STATE.

31. LEELAVATHI, AGED 47 YEARS,
W/O.AMMU RAI, C/O.KAMALA HINGSU,
SHIRIBAGILU VILLAGE, BERE BHAKTHEMANA HOUSE,
P.O.SHIRIBAGILU, KASARGOD TALUK.

32. RAJIVA N. SHETTY, AGED 61 YEARS,
S/O.K.NARAYANA SHETTY, ELARAHIM MISTRY,
CHAWL, MAROLI VILLAGE, J.B.NAGAR. P.O.,
MAROLI, BOMBAY-400 069

33. RATHI SHETTY, AGED 66 YEARS,
W/O.MUTHAPPA SHETTY, RESIDING AT GULAB BAI
CHAWL, ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST) MUMBAI-400 060.

34. GOPALA SHSETTY, S/O.MUTHAPPA SHETTY,
AGED 45 YEARS, RESIDING AT GULAB BAI CHAWL,
ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST), MUMBAI-400 060.

35. JAYA SHETTY, D/O.MUTHAPPA SHETTY,
AGED 43 YEARS, RESIDING AT GULAB BAI CHAWL,
ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST), MUMBAI-400 060.

36. SULOCHANA SHETTY, D/O.MUTHAPPA SHETTY,
AGED 41 YEARS, RESIDING AT GULAB BAI CHAWL,
ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST), MUMBAI-400 060.

37. SHAKUNTHALA SHETTY, D/O.MUTHAPPA
SHETTY AGED 39 YEARS, RESIDING AT GULAB BAI
CHAWL, ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST) MUMBAI-400 060.

38. SUERSH SHETTY, S/O.MUTHAPPA SHETTY
AGED 42 YEARS, RESIDING AT GULAB BAI CHAWL,
ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST), MUMBAI-400 060.

39. GULABU SHETTY, MUTHAPPA SHETTY,
AGED 45 YEARS, RESIDING AT GULAB BAI CHAWL,
ROOM NO.8, PP DIAS COMPOUND,
JOGESHWARI (EAST), MUMBAI-400 060.

40. HEMAVATHI, AGED 39 YEARS,
WIDOW OF PRAKASH SHETTY,
RESIDING AT KOLKE HOUSE, KUNJATHUR POST,
KASARGOD TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 09/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 150 OF 2007

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Dated this the 9th day of August, 2007

JUDGMENT

Defendants 8,26 to 29, 31 and 32 in O.S.No.290/1986 on the file of Munsiff Court, Kasaragod are the appellants. Respondents are the plaintiffs and other defendants. The suit was filed seeking partition and separation of the shares. It was contended that plaint A schedule properties originally belonged to the Kutumba governed under Aliyasanthana Law till it was abolished by Joint Hindu Family System (Abolition) Act, 1976 and defendants 2 to 8 are managing major portion of the family properties and plaintiffs and defendants 16 to 22 are members of the Kutumba and eventhough plaintiffs requested defendants 2 to 8 to effect partition, they are not prepared and so the suit seeking separation of the shares. It was contended that Shankara Alva, husband of 12th defendant and father of defendants

13 to 15 created a false tenancy to dupe and defraud the family members and 13th defendant is not a tenant in respect of 40 cents in R.S.No.83/4, 11 cents in R.S.No.83/1 and 62 cents in R.S.No.80/8 and 13th defendant is not in exclusive possession and he has no right or exclusive possession of the properties and 13th defendant obtained an order from the Land Tribunal in SM.678/1977 but it is fraudulent and collusive one and is not binding on the plaintiffs or the plaint schedule properties. Plaintiffs sought division of the plaint schedule properties into 32 equal shares and allotment of 20 shares to plaintiffs and defendants 17 to 22 and 25. Defendants 2 and 8 filed a joint written statement contending that second defendant is the wife of Monappa Chowta and item No.2 of the plaint A schedule properties measuring 1.24 acres in R.S. No.80/8 is not available for partition and R.S. No.80/8 does not belong to the Kutumba or in the joint possession of plaintiffs and defendants and defendants are not managing any portion of Kutumba

properties. It was contended that items 1,3 and 4 of the plaint A schedule properties are separately in the possession and enjoyment of defendants 1,2 and 13 and defendants 2 and 8 are entitled to their share of income from item No. 1, 3 and 4 of the plaint A schedule properties and 13th defendant is not a tenant and he is in possession of the property as a member of the family and after the death of Shankara Alva he continued in possession of the properties and the order obtained by him from the Land Tribunal is fraudulent and collusive and is not binding on Kutumba properties. It was also contended that a usufructuary mortgage was created in respect of the property in R.S.No.80/8 in favour of 8th defendant by the Kutumba as per registered deed dated 6.5.1946 and the mortgagee was put in possession and enjoyment of the property and the right of the Kutumba to redeem the mortgage is barred by time and without redeeming the mortgage the property cannot be partitioned. 13th defendant filed a separate written statement

claiming tenancy right. Defendants 26 to 29, 31 and 32 also filed a written statement contending that item No.2 of the plaint A schedule properties is not available for partition and plaintiffs have no right over that property and item 1,3 and 4 are in the possession of plaintiffs and 13th defendant is not a tenant and without redeeming the mortgage of 1946, property in R.S.80/8 which is in the possession of 8th defendant cannot be divided and they along with defendant No.30 are entitled to 1/32 shares and it is not in the joint possession and it cannot be partitioned.

2. Learned Munsiff on the evidence of Pw1 and DW1 and Exts.B1 to B14 and X1 to X1(a) passed a preliminary decree finding that plaint A scheudle properties except 40 cents in R.S.83/1 and 52 cents in R.S.80/8 are available for partition and they are to be divided into 32 equal shares and plaintiffs and defendants 17 to 22 and 25 are entitled to 20/32 shares. Tenancy claimed by 13th defendants over the excluded portion of the

properties was upheld. The preliminary decree was challenged by the plaintiffs in A.S.86/2002 and by defendants 8, 26 to 29 and 31 and 32 the appellants herein A.S.87/2002. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeals and confirmed the preliminary decree. It is challenged in the second appeal by the appellants in A.S.84/2002.

3. Learned counsel appearing for appellants was heard.

4. The argument of learned counsel appearing for appellants is that courts below should have found that the oral lease set up by 13th defendant is not valid as written consent of all the major members of the kutumba was not obtained and the lease was not for the benefit of the Kutumba and therefore hit by Section 29 of Madras Aliyasanthana Act, 1949. It was also contended that courts below should have found that 13th defendant is not a cultivating tenant and

properties claimed by 13th defendant are also should have been found available for partition. It was also argued that courts below should have found that as the mortgage evidenced by Ext.B2 which was in 1946 was not redeemed and was barred when the suit was filed and so the property covered by Ext.B2 is not available for partition. Learned counsel also argued that Ext.B2 should have been acted upon by the courts below and therefore the preliminary decree is to be modified.

5. On hearing learned counsel appearing for appellants, I do not find any substantial question of law involved in the appeal.

6. The oral lease upheld by the courts below is in favour of 13th defendant, to whom jenm right was assigned by the Land Tribunal. It was attacked by the learned counsel projecting that the oral lease was not granted with the written consent of all the major members of the Kutumba and was not for the necessity or benefit of the Kutumba and therefore it is hit by Section 29 of Act and as it

was not considered by the courts below, it is a substantial question of law to be considered in this case. It was argued that as Ext.B2 along with Ext.B4 gift deed and Ext.B3 series of tax receipts establish that the mortgagee was put in possession and the mortgage was of 1946 was not redeemed, and as the redemption is barred courts below should not have directed partition of the property covered under Ext.B2.

7. True, section 29 of Madras Aliyasanthana Act provides that no sale or mortgage of any immovable property of a Kutumba and no lease of any such property either for a premium returnable wholly or in part or for a period exceeding five years, shall be valid, unless it is executed by the yajaman, for consideration, for Kutumba necessity or benefit and with the written consent of the majority of major members of the Kutumba and no lease of any immovable property of a Kutumba in cases not referred earlier shall be valid unless it is executed by the yajaman and where the Malabar

Tenancy Act confers fixity of tenure on the lessee, unless written consent of majority of major members of the Kutumba has been obtained to the lease. Hence even for granting a lease written consent of majority of members of the Kutumba is necessary. In addition the lease or alienation should be for the necessity or benefit of the Kutumba. But sub section (3) of Section 7B of Kerala Land Reforms Act is an exception to Section 29 of Madras Aliyasanthana Act. Under sub section (3) of Section 7B, notwithstanding anything to the contrary contained in the Kerala Land Reforms Act or in any other law or in any contract, custom or usage or in any judgment, decree or order of any Court, any person in occupation of land on the basis of an oral permission or a deed purporting to be lease deed, granted by a person governed by the Madras Aliasanthana Act, 1949 shall be deemed to be a tenant, if he or his predecessor-in-interest was in occupation of such land at the commencement of the Kerala Land Reforms (Amendment) Act, 1969.

Therefore even if the oral lease set up by 13th defendant was not after obtaining the written consent of majority of major male members of Kutumba or for the benefit of Kutumba, under sub section (3) of Section 7B the oral lease granted by a person governed by Madras Aliasanthana Act, 1949 is valid if the tenant was in occupation of the property as on 1-1-1970. In that case the tenant is deemed to be a tenant as defined under the Act entitled to the protection. Sub section (43) of Section 2 of Kerala Land Reforms Act defines person as "shall include a company, family, joint family, association or other body of individual, whether incorporated or not and any institution capable of holding property". Therefore the person defined is includes of a co-owner. In such circumstance, the lease upheld by the courts below in favour of the 13th defendant cannot be challenged on the ground of violation of the provisions of Section 29 of Madras Aliasanthana Act.

8. Learned counsel then argued that in any event as Ext.B2 mortgage was of 1946 and as its redemption is barred by limitation, courts below should not have granted partition of the property covered by Ext.B2 mortgage. Ext.B2 is the registered copy of the mortgage deed of 1946. The trial court and first appellate court found that execution of Ext.B2 mortgage, which was disputed by the plaintiffs, was not proved. Though it was contended that as it is more than 30 years old and as provided under section 90 of the Indian Evidence Act, the document should have been accepted as proved, drawing the presumption provided therein, the courts below rightly found that the presumption provided under section 90 is available only if the original document is produced and not for a registration copy of a document aged more 30 years old. That finding is perfectly correct. Learned counsel then argued that Ext.B4 gift deed with B3 series establish that the mortgagee was put in possession. As rightly found by courts below ,

there was no evidence to prove that Ext.B4 gift deed was acted upon or was accepted. That factual finding cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure. In such circumstance, no substantial question of law is involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006